ONG SEOK HENG

v.

WEE CHEONG MOTOR & HOUSING DEVELOPER SDN. BHD.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING SUMMONS NO. 24-666-1985]
12 SEPTEMBER 1990

CONTRACT: *Sale and purchase - Breach - Specific performance - Damages in lieu - Assessment of damages - Date of market value - Whether date of contractual completion or date of judgment - Whether loss mitigated - Section 18 Specific Relief Act 1950 - Section 74 Contracts Act 1950.*

On 10 December 1977, the applicant O and the respondent W entered into a sale and purchase agreement for the construction of a flat (the said property) for a sum of RM47,000. O paid W RM1,000 as part payment of the purchase price. Although the plans for construction of the said property were approved, W did not commence construction as they were unable to evict the squatters from the said property.

In 1981, O lodged a private caveat and commenced action in 1985 for specific performance of the agreement and damages. On 22 September 1986, the Court ordered W to pay damages to O in lieu of specific performance failing which the private caveat would remain. A year later, the Senior Assistant Registrar (SAR) awarded damages in the sum of RM54,000 with interest at 8% p.a. and the refund of RM1,000 also at 8%. The Registrar arrived at this price by taking the difference in price between the market value the property as at date of judgment (RM100,000) less the contract price (RM47,000).

W appealed on the basis firstly that the SAR had erred in principle in the assessment of damages in that the damages assessed should be the difference in market value at the purported date of completion less contract price and secondly that the SAR had failed to consider O's delay in mitigating her loss.

Held:

[1] As the Court had awarded damages in lieu of specific performance under s. 18 of the Specific Relief Act 1950, the Court, when assessing damages under s. 18, should adopt the same basis of assessment of damages as under s. 74 of the Contracts Act 1950 (where market value is at contractual time for completion); however there is a list of authorities where the Court had determined the market value of the property on other dates for e.g., date of judgment.

[2] In the absence of evidence that W was a licensed housing developer under the Housing Developers (Control and Licensing) Act 1966 and the absence of a proper sale agreement executed between the parties as to date or time for completion of sale, the market value should be assessed at the date of the breach which on the facts of this case must be when W admitted on the date of judgment that they were unable to construct the said flat.

[3] Based on her affidavit, O had not acted unreasonably in prosecuting her case.

[Appeal dismissed.]

[Editor's Note: The respondent has lodged an appeal to the Supreme Court.]

Cases referred to:
Davies v. Powell Duffryn Associated Collieries Ltd. [1942] AC 601
Central Malaysia Development Co. Ltd. v. Chin Pek Chin [1967] 2 MLJ 174
Balasubramaniam v. Venkitasan [1986] 2 MLJ 55
Cheng Chuan Development Sdn. Bhd. v. Ng Ah Hock [1982] 2 MLJ 222
Johnson v. Agnew [1980] AC 367
Malhotra v. Choudhury [1980] 1 Ch 52

Legislation referred to:
Contracts Act 1950, s. 74
Housing Developers (Control and Licensing) Rules 1970, r. 12(1)
Specific Relief Act 1950, s. 18

For the respondent/appellant - Ismadi bin Zainal Abidin; M/s. Mahinder Singh Dulku & Co.
For the applicant/respondent - Chen Mun Peng; M/s. Chew, Tan & Lim

JUDGMENT

Mohamed Dzaiddin J:

This is an appeal from the decision of Penolong Kanan Pendaftar on the question of damages in lieu of specific performance of an agreement for sale of a flat.

Before I proceed to consider this appeal, I must remind myself of the principle upon which an appellate Court will interfere with the award of damages made by a single Judge. In *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] AC 601 at pp. 616-617, Lord Wright stated at p. 617 as follows:

> It is difficult to lay down in precise rule which will cover all cases but a good general guide is offered by Greer LJ in *Flint v. Lovell*. In effect, the Court, before it interferes with an award of damages, should be satisfied that the Judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.

With this in mind, I shall now proceed to consider the grounds of appeal. However, before doing so let me briefly state the facts of the case. By an agreement in writing dated 10 December 1977 made between the applicant and the respondent, the respondent agreed to sell to the applicant a unit of flat to be constructed on Lots 56, 57 and 227, Section 6, North East District, Pulau Pinang ("the said property") at the purchase price of RM47,000. The applicant paid to the respondent RM1,000 as part payment towards the purchase price. The necessary plans for the construction of the said property were duly approved. The respondent however did not commence constructing the said flat for reason which was known later to be due to the respondent's inability to evict the squatters from the said property. Subsequently, some time in June 1981 the applicant lodged a private caveat over the said property. This was followed by filing an action against the respondent *vide* Civil Suit No. 1190 of 1985 on 1 October 1985 claiming for specific performance of the said agreement and damages in addition to or in lieu of specific performance. On the hearing of the application by the respondent under the present originating summons to remove the private caveat, the respondent admitted that they were unable to construct the said flat thereby breaching the agreement. In the result, on 22 September 1986 this Court ordered the respondent to pay damages to the applicant in lieu of specific performance to be assessed by the Penolong Kanan Pendaftar, failing which the private caveat would remain until the disposal of the Civil Suit No. 1190 of 1985. On 27 October 1987, the learned Penolong Kanan Pendaftar awarded the respondent damages in the sum of RM54,000 with interest at 8% per annum and the

refund of RM1,000 being the deposit paid by the applicant to carry interest at similar rate. The Registrar arrived at this sum by taking the difference in price between the market value of the property as at the date of judgment (RM100,000) less the contract price (RM47,000).

Therefore, the issue in this appeal is whether the learned Penolong Kanan Pendaftar erred in principle in the assessment of damages.

Encik Ismadi, Counsel for the respondent submitted that the learned Penolong Kanan Pendaftar erred on two grounds in her assessment of damages. First, he contended that the measure of damages should be the market value of the said property at the purported date of completion of the contract less the contract price. Counsel relied on the judgment of Gill J in *Central Malaysia Development Co. Ltd. v. Chin Pak Chin* [1967] 2 MLJ 174 (FC) followed by Shankar J in *Balasubramaniam v. Venkitasan* [1986] 2 MLJ 55. Counsel submitted that as the present case involved the sale of a flat and no specified time for completion was stated in the agreement, the Housing Developers (Control and Licensing) Rules 1970 should apply and under r. 12(1) the completion period must be deemed to be 18 months from the execution of the sale agreement. In the circumstances, the amount of damages should be the difference between the market value of the property at the completion of 18 months from 10 December 1977 less the contract price of RM47,000.

Secondly, Counsel submitted that the Registrar had failed to consider the applicant's conduct in not mitigating her loss. She ought to have prosecuted her claim much earlier and not to wait for 8 years after the signing of the booking proforma to file her writ. In the circumstances, there was considerable delay on the applicant's part to bring this action which disentitled her to claim the market price to be at the date of judgment.

In the present appeal, it is not disputed that the applicant's claim against the respondent in Civil Suit No. 1190 of 1985 was for specific performance of the sale agreement and for damages in addition to or in lieu of specific performance. Thus, this Court, in awarding damages in lieu of specific performance acted under s. 18 of the Specific Relief Act 1950 (Act 137). However, it is quite proper, indeed this Court when assessing damages under s. 18 should adopt the same basis of assessment of damages as under s. 74 of the Contracts Act 1950 (Act 136). (See: *Sinnadurai's Sale and Purchase of Real Property in Malaysia* p. 427.) Thus, Gill J in *Central Malaysia Development Co. Ltd. v. Chin Pak Chin* (*supra*) stated that in contracts for the sale of land where the contract is not completed the normal measure of damages is the market value of the property at the contractual time for completion less the contract price. This means the market value is to be assessed as at the time when the breach occurred. However, there are cases where the Courts had determined the market value of the property on some other dates, e.g., the date of judgment. In *Cheng Chuan Development Sdn. Bhd. v. Ng Ah Hock* [1982] 2 MLJ 222, the Federal Court, affirming the decision of the trial Judge, assessed damages to be the difference between the contract price and the price at which the shophouse was sold to the third party. In *Tan Geok Khoon & Anor. v. Paya Terubong Est. Sdn. Bhd.* (Penang High Court Civil Suit No. 831 of 1984), Datuk Edgar Joseph Jr. J held that the relevant date for the assessment of damages would be the date of judgment especially since there was no evidence that they would be greater if assessed at the date of breach. In *Johnson v. Agnew* [1980] AC 367, the House of Lords held that the date of assessment of damages for a claim of specific performance should be that at the date when the contract was lost which would be the date of the hearing of the specific performance. In *Malhotra v. Choudhury* [1980] 1 Ch 52, the Court of Appeal held that the date for assessment of damages should be the date of the judgment and not the date of the breach.

Following the above decisions, I must reject Encik Ismadi's submission that the market value of the flat should be assessed as at the expiry of 18 months from the date of the agreement. Here, there is no evidence that the respondent was a licensed housing developer under the Housing Developers (Control and Licensing) Act 1966. There was also no proper sale agreement executed between the parties thereby not specifying the date or time for the completion of sale. Therefore, in the absence of these facts, in my opinion, the market value should be assessed at the date of the breach which on the facts in this case must be the date when the respondent admitted (at the hearing of the application for the removal of the private caveat) that they were unable to construct the said flat i.e., at the date of the judgment. In the result, I hold that the assessment by the Penolong Kanan Pendaftar is correct.

On the issue whether the applicant ought to have mitigated her loss, I am satisfied, based on the facts, the applicant had not acted unreasonably in prosecuting her case. From her affidavit dated 24 September 1985 filed in support of her application for an extension of the private caveat until the final disposal of the civil suit, I am satisfied that the applicant had given a satisfactory explanation.

For reasons stated above, it is my finding that the Penolong Kanan Pendaftar had not erred in principle. This appeal is dismissed with costs.

Also found at [1990] 2 CLJ 1007